BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the matter of: Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information;	FCC Docket No. 96-115
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1993, as amended.	FCC Docket No. 96-149

COMMENTS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION

The California Public Utilities Commission (CPUC or California) hereby submits its comments on the Further Notice of Proposed Rulemaking in the Federal Communications Commission's (FCC) Customer Proprietary Network Information (CPNI) Rulemaking, CC Docket No. 96-115.

I. FEDERAL PROCEDURAL HISTORY

In 1996, the Congress passed the Telecommunications Act of 1996 (Act), § 222 (c)(a), which provided as follows:

> **Privacy requirements for telecommunications carriers. –** Except as required by law with the approval of the customer, a telecommunications carrier

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> that receives or obtains customer proprietary network information by virtue of its provision of telecommunications service shall only use, disclose or permit access to individually identifiable customer proprietary network information in his provision of (a) the telecommunications services from which such information is derived, or (b) services necessary to or used in the provision of the telecommunications services, including the publishing of directories. [Emphasis added.]

On February 26, 1998, the FCC released its CPNI Order, in which it interpreted the meaning of § 222 of the Act, and set forth regulations to implement that section. In that Order, the FCC found that § 222 of the Act expressly directed "balance of 'both competitive and consumer privacy interests with respect to CPNI'."[1] The FCC Order found this conclusion to be supported by the plain wording of the statute, which recognizes the duty of all telecommunications carriers to protect customer information and embodies the concept that customers must be able to control information they view as sensitive and personal from unauthorized use, disclosure, or access by carriers. The FCC Order found that if information is not sensitive, § 222 of the Act permits the free flow of CPNI without the customer's prior approval for marketing purposes within the existing service relationship.[2] Thus, the FCC Order found that a carrier could use a customer's CPNI without the customer's prior approval for marketing purposes

[1] CPNI Order, 13 FCC Rcd 8065, ¶ 3 (citing the Joint statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess., 1 (1996).

[2] Id. at 8966, ¶ 3.

within the existing service relationship.[3] On the other hand, the FCC found that carriers must notify the customer of his or her rights under § 222 and then obtain express written, oral or electronic customer approval before a carrier may use CPNI to market services outside the customer's existing service relationship with that carrier. This procedure is known as the opt-in approach.[4]

On August 18, 1999, the United States Court of Appeals for the Tenth Circuit issued, *United States West, Incorporated v. FCC*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 2215 (June 5, 2000) (No. 99-1427) (*U.S. West v. FCC)*, vacating a portion of the Federal Communication Commission's (FCC) 1998 Order addressing Customer Proprietary Network Information (CPNI). In this case, U.S. West asserted that the opt-in approach for customer approval in the FCC CPNI order for information beyond the existing service relationship with the carrier violated the First and the Fifth Amendments to the Constitution.[5] The Court refused to review the FCC's opt-in approach for information beyond the existing service relationship with the carrier under the traditional administrative law standard of *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (Chevron). The Court declined to follow the *Chevron* standard, because it found that serious constitutional questions were raised by the approach that the FCC had taken in this case and determined that it must be

[3] Id. at 8080, 8083-84, 8087-88, ¶¶ 23-24, 30, 35, 8966, ¶ 3.

[4] Id, at 8127-45. ¶¶ 86-107.

[5] *U.S. West v. FCC, supra*, at 1231.

reviewed under the constitutional standards applicable to regulations of commercial speech in *Central Hudson Gas & Electric Co. v. Public Services Commission,* 477 U.S. 557 (1980) (Central Hudson). After making the *Central Hudson* analysis, the Court concluded that the government had not demonstrated that the CPNI regulations requiring opt-in customer approval for information beyond the existing service relationship with the carrier directly and materially advanced the FCC's interest in protecting privacy and promoting competition.[6] The Court concluded that the Commission's determination that an opt-in requirement would best protect the customers' privacy interest was not narrowly tailored enough because the FCC had failed to adequately consider an opt-out option. The Court stated that an opt-out option should have been more fully investigated as it is inherently less restrictive of speech. Further, the court ruled that the FCC did not adequately show that an opt-out option would not offer sufficient protection to consumer privacy.[7] In vacating certain portions of the FCC's CPNI order, the Court did not require that the FCC specify that the opt-out approach was the correct approach. Instead, it found fault with the Commission's "inadequate consideration of the approval mechanism's alternatives in light of the First Amendment."[8] The court's opinion in *U.S. West v. FCC* analyzed only the

[6] *Id.,* at 1235-37.

[7] *Id.* at 1238-39.

[8] Id. at 1240, n.15.

constitutionality of the FCC's interpretation of the customer approval requirement of § 222(c)(1) of the Act.

In response to the *U.S. West v. FCC* case, the FCC released Decision FCC 01-247 in the CPNI Docket on September 7, 2001. In this Order, the FCC set forth the status of the rules that were not considered by the *U.S. West* court and thus not reversed.

In this decision, the FCC also issued a Further Notice of Proposed Rulemaking, in which it seeks comment on the responsibility of carriers' obtaining consent from customers for the use of CPNI and, specifically, whether the FCC should adopt opt-in or opt-out consents from § 222(c)(i). Further, in its Further Notice of Proposed Rulemaking, the FCC seeks comments on how to obtain a more complete record of methods by which customers can consent to a carrier's use of their CPNI. The FCC seeks comments on what methods of approval would serve the governmental interest at issue, and afford informed consent, while also satisfying the telecommunications companies' requirement that any restrictions on their commercial speech be narrowly tailored. The FCC also seeks comment on the interests and policies underlying § 222 relevant to formulating an approval requirement, including an analysis of the privacy interests that are at issue, and on the extent to which it should take competitive concerns into account. Another concern that the FCC articulates and seeks comment on is whether it is possible for it to implement a flexible opt-in approach that does not run afoul of the First

Amendment, or whether opt-out approval is the only means of addressing the constitutional concerns expressed by the Tenth Circuit.[9]

A. California Procedural History

California adopted stricter CPNI requirements than those in the federal regulations that predated the 1996 Act. The CPUC has restricted access to CPNI by any provider unless the customer notifies the LEC in writing. The CPUC has taken that position because the adoption of this type of rule more justly balances privacy, competitive equity and efficiency concerns. The CPUC adopted this position because it is one of the ten states that have taken a special interest in the right of privacy by making it an unalienable state constitutional right.[10] In 1974, the California Constitution was amended to state:

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life, liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness, and privacy.[11]

The California Supreme Court interpreted this amended provision in a case called *White v. Davis*, stating that:

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[9] CPNI Order, 13 FCC Rcd at 8064, § 2.

[10] California State constitutional right to privacy was adopted pursuant to the initiative process in November, 1972, and reworded by a further constitutional amendment in November, 1974. Both amendments passed by a two-thirds majority vote. See *White v. Davis*, 533 P.2d 222, 233, n.9 (Cal. 1975).

[11] See, Cal. Const. Art. I, § 1.

> The moving force behind the ... constitutional provision was ... the accelerating encroachment on personal freedom and security caused by increasing surveillance and data collection activity in contemporary society. The new provision's primary purpose is to afford individuals more measure of protection against this most modern threat to personal privacy.[12]

Proponents of this constitutional amendment included a statement in the state election brochure that read in part:

> The proliferation of government snooping and data collection is threatening to destroy our traditional freedoms. Government agencies seem to be competing to compile the most extensive set of dossiers of American citizens. Computerization of records makes it possible to create 'cradle-to-grave' profiles of every American. At present there are no effective restraints on the information activities of government and business. This amendment creates a legal and enforceable right of privacy for every Californian.
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> The right of privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion and our freedom to associate with the people we choose. It prevents government and business interests from collecting and stockpiling unnecessary information about us and from misusing the information gathered for one purpose in order to serve purposes or to embarrass us.
>
> Fundamental to our privacy is the ability to control circulation of personal information. This is essential to social relationships and personal freedom. The proliferation of government and business records over which we have no control limits our ability to control our personal lives. Often we do not know that these

[12] *White v. Davis*, 533 P.2d at 233.

> records even exist. We are certainly unable to determine who has access to them"[13]

A Californian's right to privacy is further protected under § 13 of the California State Constitution, which ensures:

> [t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures.[14]

Like the Fourteenth Amendment to the U.S. Constitution, this section has been applied to protect telephone users and their private information. Beyond California's constitutional protections regarding privacy, the California Legislature has acknowledged the importance of privacy in a number of statutes. This has led to a number of fairly strict laws regarding wiretapping, particularly when no warrant has been sought. Privacy in telecommunication is also protected under § 16606 of the California Business and Professions Code, pursuant to which customer lists of answering services are trade secrets and, consequently, confidential information. This section protects both the names and addresses of the customers of answering services.[15]

As can be seen from the above, California has enacted many privacy-related laws. The California laws protecting personal privacy also address governmental agency information use (California Civil Code § 1798), telephone record use and wiretapping (California Penal Code § 631-637), credit reporting

[13] *Id.* at 233 (quoting November 1972 state election brochure).

[14] Cal. Const., Art. I, § 13.

[15] Cal. Business and Professions Code § 16606 (West 1992).

(California Civil § 1785, California Consumer Credit Reporting Agency's Act), telemarketing (California Public Utilities Code §§ 2873, 2874, 2893, 2891.1, and 2876), medical records (California Health and Safety Code § 123100, Cal. Civ. Code §§ 56, 56.16, and California Health and Safety Code § 103885), employment records (California Labor Code § 1198.5, California Education Code § 24317 and § 92612, Education Code § 44931 and Labor Code § 1196.5), cable television (California Penal Code § 637.5), video rental records (California Civil Code § 1799.3), merchant information gathering (California Civil § 1725), insurance record-keeping (California Insurance Code, Art. 6.6, § 791), and identity theft (California Penal Code § 2528.536). In many instances, California has led the nation in the creation of laws that protect personal privacy. Moreover, the list of California laws protecting personal privacy that is given above is not all-inclusive.

Californians themselves have taken extra steps to protect their privacy. For example, over 50 % of the households in the state have unlisted telephone numbers. That figure reaches nearly 70% in Sacramento, San Diego, Los Angeles, San Jose, Fresno and Oakland. The national average, in contrast, is 24 % of households.[16]

Californians' interest in privacy has been explicitly extended to CPNI through California Public Utilities Code § 2891.[17]

[16] Privacy Rights Clearing House.

[17] No telephone corporation ... shall make available to any other person or corporation without first obtaining the residential subscriber's consent, in writing, any of the following information: (1) The subscriber's personal calling patterns … excluding the information of the person calling and the telephone number to which the call was placed …. (2) The residential subscriber's credit or other personal financial

This statute was drafted in reaction to the huge public outcry that occurred when Pacific Bell announced plans in mid-March, 1996, that it would begin selling customer directory information to telephone solicitors. As the legislative record of committee hearings on this matter notes:

> Two problems telephone customers complained about when Pacific initiated a sales program were that they were not adequately informed before the program began, and that they had to return a confusing form if they did not want to participate in the program. In other words the telephone company assumed subscribers' participation in the selling of telephone numbers unless the subscriber took action to pull themselves out of the program. [18]

The California Legislature found that the residential telephone customers' right to private communications is a paramount state concern. Because of this, the Legislature enacted § 2891 to require affirmative written consent before sensitive personal information was released. See *California Public Utilities Code*, § 2891, n.1.

Section 2891 prohibits telephone corporations from making available to any other person or corporation private financial, calling patterns, types of telephone services utilized or demographic information about a residential customer without obtaining the customer's written consent

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information …. (3) The services which the residential subscriber purchases from the corporation or independent subscribers of information services who use the corporation's telephone or telegraph lines to provide service to their residential subscriber. (4) Demographic information about the residential customer or subscriber, or aggregate information from which the individual identities and characteristics have not been removed. California Public Utilities Code § 2891 (West 1992).

[18] Senate Committee on Energy and Public Utilities, Hearing on AB 3383, June 24, 1986.

California Public Utilities Code § 2891.1 further limits the use of information about a subscriber:

> A telephone corporation selling or licensing lists of residential subscribers shall not include the telephone number of any subscriber assigned an unlisted or unpublished access number.[19]

Section 2891.1 was added to the Code because telephone companies have information about subscribers' names, addresses, billing addresses, credit information, telephone number, calling patterns, and types of telephone services utilized. Such information has traditionally been disclosed only in very specific circumstances. Most private companies will do what they wish with their customers' information, including packaging and selling the information. However, subject only to limited legal restrictions on the release of credit-related information, telephone companies are limited in their ability to disclose subscriber information because, unlike most other business enterprises, customers have <u>no choice</u> but to provide private information to a local telephone company in order to receive service.[20]

Based on this history, California filed comments with the FCC on March 27, 1998. In those comments, the CPUC noted that, while § 222 of the Act recognizes that carriers must have access to CPNI for such purposes as billing, inside wire installation, maintenance, and repair services, the CPUC believes that,

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[19] *Id*. at § 2891.1.

[20] The National Regulatory Research Institute, Utility Customer Information: Privacy and Competition Implications (1992).

at a minimum, CPNI is the type of service that Congress had in mind when it referred to "services necessary to 'the provision of telecommunications services'" and thus is protected. A broader interpretation would fly in the face of the kinds of protections that are important to the residents of the state of California and of the nation as a whole.

II. DISCUSSION

The FCC's initial concern is to obtain a complete record on the ways in which customers can consent to a carrier's use of their CPNI while balancing the concerns of privacy, competition, and commercial interests. California's response to this question naturally centers on the backdrop of the importance of privacy to California's consumers as well as the promotion of competition in the telecommunications marketplace. The two cases where the issue of opting-in or opting-out in relation to privacy and competitive issues have come up in California relating to two service offerings: "Caller ID" service, and "billing of non-telecommunications items" service.

In both the cases of "Caller ID" and "the offering of non-telephone charges on telephone bills," the CPUC has attempted to balance the rights of consumers' privacy and the right to be protected from fraud with the commercial interests of telephone companies to provide new services and enhance a competitive marketplace. Hopefully, these examples below will be instructive in making this same balance in the CPNI area. Our experience in California shows that in considering areas where privacy is a concern, such as CPNI, the FCC can reasonably accommodate commercial speech issues as long as consumers are informed in such a manner that the average person would understand what he or she is giving up. Generally, a written document, which could include an electronic signature, is the best way to assure that a customer understands that information, which here-to-for has been private, is now moving into a more public setting.

A. Caller ID

While the CPUC realizes that the Caller ID service has not been handled in the same manner throughout the country, it is included in this discussion as an example of the process that California went through to balance the various privacy and commercial interests of the two key competing stakeholder groups: telecommunications companies and their customers.

The CPUC's decision[21] ordered that Caller ID service was in the public interest and found that Caller ID would not warrant intrusion into the privacy rights of Californians if provided under the conditions outlined in the CPUC's decision. The conditions were that there had to be extensive customer notification and education programs and choice of blocking options and periodic compliance reports. Further, the CPUC recognized in its opinion that an integral part of whether Caller ID would constitute an unwarranted intrusion on the right of privacy was the manner in which the service was to be offered. Specifically, the

[21] *In re Pacific Bell*, No. 92-06-065 (CPUC June 17, 1992).

issue of which blocking option would be made available was key to deciding whether Caller ID was in the public interest and whether the right to privacy would be jeopardized by that service.

The Commission therefore authorized three blocking options: 1) per-call blocking, 2) per-line blocking, and 3) per-line blocking with per-call enabling. With per-call blocking, the calling party would have to press three digits (*67) in order to prevent the disclosure of the calling party's number. Per-line blocking prevents disclosure of the calling party's number for all calls made from a blocked access line. All parties with access lines would have a choice of per-line or per-call blocking. In per-line blocking with per-call enabling, the party would have to notify the telephone company that he or she wanted all calls blocked, except those specifically unblocked by pressing a three-digit code.

For those subscribers who failed to make an affirmative choice as to which blocking option they prefer, the CPUC decided that they would be assigned, by default, to per-call blocking if they were published subscribers, because published subscribers should be presumed not to have specially sensitive concerns to protect the privacy of their phone numbers. Unlisted or nonpublic customers who did not make a choice would be defaulted to per-line blocking with per-call enabling. The CPUC found that there was a heightened expectation of privacy in unlisted or nonpublished information, such that unlisted subscribers should be presumed to want their outgoing calls blocked, but also to have the option to enable the identification of their number to selected recipients of their calls. Emergency service providers, such as police and shelters for battered spouses, would also receive the default protection of default per-line blocking with per-call enabling. These organizations are deemed to have special legitimate needs for precluding disclosure of the calling number.[22] In *In re Pacific Bell,* the CPUC was attempting to determine what was in the public interest by balancing privacy rights of both the "calling party" and the "called party" with the technological innovation and competition that the offering of Caller ID service would bring to consumers.

It was unavoidable that if the CPUC were going to respect the ratepayers' right to privacy and also honor the utilities' desire to introduce new technology and enhance competition in the telecommunications marketplace, the CPUC's decision on Caller ID service would have to be a compromise that gives proper weight to the ratepayer' right to privacy and the utilities desire to introduce new technology and enhance competition. All of these interests are provided for in the California Public Utilities Code.[23] On the other hand, the Commission had to take into consideration the California Constitution and all the many California statutes that protect privacy rights.

In adopting these laws and the recent Constitutional amendment, the California Legislature understood that while technological innovation and competition were to be encouraged, scientific advances and market forces might also erode an individual's right to privacy. Therefore, as discussed above, the

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[22] *In re Pacific Bell, supra.*

[23] See *Public Utilities Code, § 709.*

California Legislature has passed many statutes that attempted to balance California's conflicting privacy interests versus their interest in technological advances and competition in the telecommunications marketplace.

With regard to Caller ID, the Legislature enacted an entire article dealing with the customer's right to privacy. Public Utilities Code § 2893 specifically targets Caller ID and makes it clear that privacy occupies the highest place in the panoply of statutory rights provided to all Californians. The CPUC's Caller ID decision both complies with relevant statutes protecting privacy and provides access to competitive telecommunications and information services without forcing new technologies on those who do not want them. Offering the choice of three blocking options was essential to the balancing of the new technologies with the right to privacy. The CPUC decision further recognized the heightened need for privacy for those subscribers with unlisted or nonpublished service by providing default per-line blocking with per-call enabling to nonpublished customers.

The issues raised in the Caller ID debate primarily involved balancing the competing privacy interests of the called party and the calling party, and the commercial interests of the telephone companies in offering of a new service. By contrast, in the case of CPNI, the type of information at issue is, for example, a person's calling patterns. This type of information is quite different from what was at issue in the Caller ID debates, as it is the type of information that most people would consider to be private and not for sale. The purpose of a telecommunication company's wish to sell CPNI information is not to offer a new service to its customers but simply to get more information on individuals that might or might not be used for legitimate commercial marketing needs of existing services.

B. Non-Telephone Charges Billed on Telephone Bills

In a more recent case (Decision 01-07-031 issued July 12, 2001), the CPUC was faced with the choice of an opt-in or an opt-out approach affecting both the provision of competitive and innovative services and the rights of consumers to protect certain privacy rights, namely, to keep their telephone bill and number from being used for non-telephone charges.

In an effort to address the issue of cramming, which deals directly with the question of unwanted items being billed on one's telephone bill, the California Legislature enacted Public Utilities Code §§ 2889.1 and 2890, which contain many provisions designed to deter cramming, and, in addition, authorize the CPUC to adopt rules needed to accomplish the consumer protection guarantees of those statutes. Section 2890, however, was amended effective July 1, 2001, to permit the use of telephone bills to bill for non-communications charges, subject to CPUC rules.

The allowance of non-telephone charges on telephone bills presented a significant challenge in terms of protecting consumers' privacy and also making sure that consumers were not crammed. As the FCC has noted:

> It is significantly easier to bill fraudulent charges on telephone bills than on credit card bills. While credit card charges require access to a customer's account number that consumers understand should be treated as confidential, all that is often required to get a charge billed on a telephone number is a consumer's telephone number. This number is not only expected to be widely distributed but not easily be captured by an entity even when the consumer has not authorized charges or made a purchase.[24]

Although cramming does not necessarily involve multiple entities, experience has shown that it often occurs in the context of a billing change involving one or more billing agents in addition to the billing telephone company, yet another entity is responsible for initiating the process of placing a charge on a subscriber's bill. For this reason, in enacting §§ 2889.9 and 2890, the California Legislature made the requirements of those sections applicable to billing agents and to other persons or corporations "responsible for generating a charge" on a subscriber's telephone bill, whether or not they are public utilities. CPUC rules implementing this anti-cramming legislation apply to these non-utility entities as well. If persons or corporations subject to §§ 2889.9 or 2890 fail to comply with the statutes or the CPUC's implementing rules, the CPUC may impose penalties on them. § 2889.9(b).

The term "entity responsible for generating a charge" (vendor) in § 2890 refers to a person, corporation, or other business entity that initiates the process of getting a charge placed on a subscriber's telephone bill. In the context of non-

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[24] *Truth-in-Billing, First Report and Order and Further Notice of Proposed Rulemaking,* CC Docket No. 98-170, 14 FCC Rcd 7492 (1999), § 7, fn. 18.

communication charges, vendors will likely not be public utilities in most cases; however, if a billing telephone company sells non-communications products or services directly to its own subscribers, it will be acting both as a billing telephone company and as a "vendor" within the meaning of the rules. Wireless telephone service providers that choose to offer billing services for non-communications products and services are also subject to these rules.

Opening up telephone bills to non-communication charges raises the question of whether these new billings services will be subject to general consumer protection laws governing credit and billing, particularly, the Federal Truth in Lending Act[25]. The implementing regulations of the Truth-in-Lending Act, Regulation Z of the Federal Reserve Board, contain the rules governing credit card transactions and billing that are relatively well known to consumers. Extensions of credit that "involve public utility services" where the "charges for services, delayed payment, or any discounts for prompt payment are filed with or regulated by governmental unit" are exempt from Regulation Z. See 12 CFR 226.3(c). Most, if not all, non-communications services that may be charged to telephone bills under the version of § 2890 that went into effect on July 1, 2001 will clearly not fall under this exception.

In Decision 01-07-031, the CPUC adopted interim rules to implement the legislative mandate contained in Public Utilities Code §§ 2889.1 and 2890. These

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[25] 15 U.S.C. § 1601.

interim rules require billing telephone companies to obtain express permission directly from the subscriber to include non-communications-related charges before any non-communications-related charges may be included on that subscriber's bill. These interim rules, if implemented consistently, should block most cramming attempts before subscribers are harmed. If crams do occur, the rules provide a relatively simple, fair and effective process for getting unauthorized charges removed and other billing errors corrected.

Before the recent amendment to Public Utilities Code § 2890, billing for non-communication charges on telephone bills was prohibited by statute, and many subscribers will initially be unaware that as a result of a change in the law, they are now exposed to a risk of having unauthorized charges for non-communication products and services placed in their telephone bills. Consumers should not be exposed to this risk unknowingly. Accordingly, the CPUC's interim rules enable the billing telephone company to block all non-communications charges on the bills of subscribers who do not want to use their telephone bills for anything but their telephone service, thereby greatly reducing the risk of fraudulent authorization. This "opt-in" authorization only needs to be obtained once from each subscriber, unless the subscriber subsequently revokes authorization for the billing of non-communications charges.

Because the harm that can result from misuse of a consumer's confidential information is great, ranging from intrusive telemarketing to identity theft and other types of fraud, it is essential that subscribers retain control of confidential information they provide the telephone companies in order to obtain service, and that this information not be used for other purposes without their consent. The CPUC's decision adopting its interim rules goes on to note that the privacy protections provided by § 2891, which requires, among other things, that telephone companies must obtain written consent from residential customers before releasing their confidential information to any other person or corporation, are an important component of the consumer protections that the Commission was adopting in that decision.[26]

C. CPNI - The Balancing Act

In both the cases of "Caller ID" and "the offering of non-telephone charges on telephone bills," the CPUC attempted to balance the rights of consumers' privacy and the right to be protected from fraud with the commercial interests of telephone companies to provide new services and enhance a competitive marketplace. As the FCC looks at how to achieve a similar balance in connection with CPNI, the California experience in dealing with Caller ID and the offering of non-telephone charges on telephone bills is instructive. Our experience in California shows that in considering CPNI, the FCC can reasonably accommodate commercial speech issues as long as consumers are informed in such a manner that the average person would understand what he or she is giving up.

In a world where the customers are bombarded with non-essential commercial mail and telephone solicitations, it is hard to come up with a manner

[26] See Decision D-01-07-031, at page 23. Conclusion of Law 12.

of communication that would meet this standard. California believes that the one type of communication where this standard will be met is express authorization found in its most complete form in **written** authorization by the consumer, either in writing or in an electronic signature. Whether any other means of communication could meet this standard is doubtful. However, to accommodate the telephone companies' desire to use CPNI to sell services, a key component of this opt-in approach has to be a significant advertising campaign by the telephone companies who want to use CPNI, supervised by the FCC, to inform customers of their right to protect their CPNI and of their option to allow the release of this information.

It would be hard to prove that even an extensive advertising campaign would reach enough of the population to constitute a credible substitute for op-in permission. As noted above, most people assume that this information is already private, since historically that has been the case. Moreover, most consumers would see no personal advantage in letting this information be disseminated because of the fear of identification theft, and because of impatience with the excess marketing that reaches into all aspects of people's lives at home and the office.

The only groups that gain any advantage in a loose, opt-out scheme where customer permission is assumed rather than actually obtained on a customer-by-customer basis are the marketing sections of telephone companies and the companies who buy this information. Thus, California would consider that any opt-out scheme is not in the public interest since it violates a customer's right to privacy and does not further competition in the telecommunications industry in any significant way.

For all the foregoing reasons, the CPUC urges the FCC to thoroughly analyze the policy and practical disadvantages of an opt-out approach for dealing with CPNI and to re-adopt an opt-in approach along the lines of that contained in its February 26, 1998 CPNI Order. Hopefully, the California experience discussed above can provide both useful information and compelling policy rationales to support an opt-in approach for dealing with CPNI that will withstand further legal challenges of the sort that the FCC faced in the *U.S. West* case.

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As a final note, the CPUC is preparing new, comprehensive consumer protection rules in its proceeding relating to the Consumer Bill of Rights. These rules will issue in the form of a General Order early next year. In that decision, it is expected that there will be an extensive discussion of privacy and of how privacy relates to a variety of consumer-oriented issues. When that order is issued, we will forward it to the FCC, since it will undoubtedly relate to many of the questions that the FCC has asked in this current docket.

Respectfully submitted,

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